


Memorandum

February 15, 2000

TO : Honorable Robert C. Scott
Attention: Theresa Thompson

FROM : David M. Ackerman 
Legislative Attorney
American Law Division

SUBJECT : Questions Concerning Possible Charitable Choice Amendment to the Even Start Program

This is in response to your request for a brief analysis of the possible legal implications of the employment discrimination provision of a charitable choice amendment that may be proposed to the Even Start program and for information on the constitutional standards governing direct public assistance to religious organizations. This memorandum responds to these inquiries in order.

Employment Discrimination

The text of the charitable choice amendment has not been made available to us. But previous charitable choice proposals have included one or both of the following provisions regarding employment discrimination:

(1) TITLE VII EXEMPTION. — The exemption of a religious organization provided under section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) regarding employment practices shall not be affected by the religious organization's provision of services under, or receipt of funds from, [name of program].

(2) TENETS AND TEACHINGS. — A religious organization that provides services under [name of program] may require that its employees providing services under such program adhere to the religious tenets and teachings of such organization, and such organization may require that those employees adhere to rules forbidding the use of drugs or alcohol.

Time limitations prevent a thorough analysis of these provisions, but several observations might be made.

First, with the exception of the part concerning the use of drugs and alcohol in the second provision, it appears doubtful that there is any significant difference in the scope of the two provisions. Both provisions appear to allow religious organizations receiving funds

under the pertinent program to discriminate on religious grounds in their employment practices. Title VII of the Civil Rights Act of 1964 generally prohibits public and private employers from discriminating in their employment practices on the bases of race, color, religion, sex, or national origin. But § 702(a) of that statute exempts religious organizations from the ban on religious discrimination, as follows:

Section 702(a): This subchapter shall not apply to ... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

That exemption, it might be noted, applies not only to the religious activities of a religious organization but also to its secular activities.¹

Title VII, of course, applies without regard to whether an organization receives public funds. The provision in the first charitable choice amendment noted above, thus, would extend the Title VII exemption for religious organizations to situations in which the organizations receive public funds under the pertinent program and allow them to discriminate on religious grounds in their employment practices to the same extent as is currently allowed by Title VII.

The language in the second provision allowing a religious organization that receives funds under the pertinent program to require its employees "to adhere to the religious tenets and teachings of such organization" appears congruent with the Title VII exemption. Under both provisions a religious organization can restrict its hiring not only to members of its own faith but to those who abide by its precepts and otherwise give preference to such persons in their other employment practices.

Second, the scope of each exemption appears to be quite broad. The Title VII exemption, for instance, has been held to protect employment discrimination by religious organizations in a variety of circumstances:

- the Church of Jesus Christ of Latter-Day Saints when it fired several employees because they failed to qualify for a "temple recommend," i.e., a certificate that they were Mormons who abided by the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco (*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987));
- a Christian school that fired a teacher for having an affair with the father of three children at the school and breaking up his marriage (*Gosche v. Calvert High School*, 997 F.Supp. 867 (N.D. Ohio 1998), *aff'd mem*, 181 F.3d 101 (6th Cir. 1999));
- a Baptist university that barred a professor from teaching at its divinity school because his theological views differed from those of the dean (*Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997));

¹ *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

- a number of Christian schools that fired female teachers for having extramarital sex or committing adultery (*Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996) and *Dolter v. Wahlert High School*, 483 F.Supp. 266 (N.D. Iowa 1980);
- a Christian college that refused to hire a Jewish professor (*Siegel v. Truett-McConnell College, Inc.*, 13 F.Supp.2d 1335 (N.D. Ga. 1994), *aff'd mem.*, 73 F.3d 1108 (11th Cir. 1995));
- a Catholic school for firing a teacher who remarried without seeking an annulment of her first marriage in accord with Catholic doctrine (*Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991));
- a Catholic university that refused to hire a female professor because her views on abortion were not in accord with Catholic teaching (*Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987));
- a Baptist nursing school that fired a student services specialist after she was ordained a minister in a gay and lesbian church that advocated views on homosexuality "which were inconsistent with the [school's] perception of its purpose and mission" (*Hall v. Baptist Memorial Health Care Corporation*, 27 F.Supp.2d 1029, 1038-39 (W.D. Tenn. 1998));
- a Presbyterian college for dismissing a Catholic professor (*Wirth v. College of the Ozarks*, 26 F.Supp.2d 1185 (W.D. Mo. 1998));
- a Christian retirement home that fired a Muslim receptionist after she insisted on wearing a head covering as required by her faith (*EEOC v. Presbyterian Ministries, Inc.*, 788 F.Supp. 1154 (W.D. Wash. 1992));
- the Christian Science Monitor when it refused to hire a non-Christian Scientist (*Feldstein v. Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983)); and
- a Catholic school when it fired a teacher for marrying a divorced man (*Bishop Leonard Regional Catholic School v. Unemployment Compensation Board of Review*, 140 Pa.Cmwlth. 428, 593 A.2d 28 (1991)).

Third, the language in the second provision allowing religious providers to "require that ... employees adhere to rules forbidding the use of drugs or alcohol" potentially has an application broader than the discrimination permitted by the Title VII provision. Rules forbidding the use of drugs and alcohol are an integral part of some religious faiths and in those cases would be legitimate grounds for discrimination under both the tenets and teachings language and the exemption based on Title VII. But not all faiths forbid the use of drugs or alcohol, and in some religions such use is even part of the rituals of the faith. For those faiths the discrimination authorized by the foregoing language would not duplicate either the tenets and teachings language or the exemption based on Title VII. Such organizations could discriminate not only on the basis of the religious character of their employees or applicants for employment but also on the basis of their use of drugs or alcohol. To that extent, then, the second employment discrimination provision is slightly broader than the first.

Finally, under both provisions there may be some question about their interplay with other nondiscrimination provisions. Title VII, for instance, allows religious organizations to discriminate on religious grounds but not on grounds of race, color, sex, or national origin. What happens, then, when religious doctrine mandates discrimination that may also implicate the other prohibited bases for discrimination? A number of cases, for example, have

involved the legality of Christian schools firing unmarried female teachers after they became pregnant. At least two courts have said that the Title VII exemption would allow the schools to dismiss a female teacher for adultery under these circumstances but that a dismissal simply for pregnancy would raise a possibility of prohibited sex discrimination.² Similarly, Title VII's ban on sex discrimination was held to apply to a Christian school's policy of extending health insurance benefits to men and single persons that were not available to married women in its employ, notwithstanding the school's contention that its religious beliefs regarded husbands as the head of the household in any marriage and as the primary provider for that household.³

Although there does not appear to be any dispositive case law, some question may also exist if an organization whose religious tenets mandate racial separation or differential treatment on the basis of race discriminates on racial grounds in its employment practices. One case involving a charge of racial discrimination by a religious institution violative of Title VII, at least, held that "if a religious institution ... presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."⁴ In the context of a program that receives public funds, of course, racial discrimination is constitutionally dubious even if it is motivated by religious belief.⁵

Similar questions would seem to be raised by either of the employment discrimination provisions.

Constitutional Standards Governing Public Aid to Religious Organizations

With respect to public aid provided directly to a religious organization in the form of a grant or contract, a basic tenet of the Supreme Court's interpretation of the establishment of religion clause of the First Amendment⁶ is that the clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."⁷ Thus, the Court has held that such public assistance must be limited to aid that is "secular, neutral, and nonideological...."⁸ That is, under the establishment clause government can provide direct support to secular programs and services sponsored or

² See *Vigars v. Valley Christian Center of Dublin, California*, 805 F.Supp. 802 (N.D. Cal. 1992) and *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D. N.Y. 1998).

³ *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

⁴ *EEOC v. Mississippi College*, 626 F.2d 477 (1980), *cert. denied*, 453 U.S. 912 (1981).

⁵ Cf. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (holding in part that the federal government has an interest in eliminating racial segregation sufficiently compelling to override the university's claim that its policies of racial discrimination are protected by the free exercise of religion clause).

⁶ The clause provides in pertinent part that "Congress shall make no law respecting an establishment of religion"

⁷ *Grand Rapids School District v. Ball*, 473 U.S. 373, 385 (1985).

⁸ *Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

provided by religious entities but it cannot directly subsidize such organizations' religious activities or proselytizing.⁹ Direct assistance must be limited to secular use.

Thus, religious organizations are not automatically disqualified from participating in publicly funded programs, and numerous religious organizations do so. But they must carry out the programs in a secular manner. That means that for purposes of direct public aid a religious organization's secular functions and activities must be able to be separated from its religious functions and activities. If they are separable, government can directly subsidize those functions. However, if the entity is so permeated by a religious purpose and character that its secular functions and religious functions are "inextricably intertwined," *i.e.*, if the entity is "**pervasively sectarian**," the Court has held the establishment clause generally to forbid direct public assistance.¹⁰

The Court has not articulated precise rules for determining what makes a religious organization "pervasively sectarian." It has looked at such factors as the proximity of the organization in question to a sponsoring church; the presence of religious symbols and paintings on the premises; formal church or denominational control over the organization; whether a religious criterion is applied in the hiring of employees or in the selection of trustees or, in the case of a school, to the admission of students; statements in the organization's charter or other publications that its purpose is the propagation and promotion of religious faith; whether the organization engages in religious services or other religious activities; its devotion, in the case of schools, to academic freedom; *etc.*¹¹ But the Court has

⁹ In most of the cases involving aid to religious institutions, the Court has used what is known as the *Lemon* test to determine whether a particular aid program violates the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The secular purpose prong of this test has rarely posed an obstacle to public aid programs benefiting sectarian entities, but the primary effect and entanglement prongs have operated, in Chief Justice Rehnquist's term, as a "Catch-22" for such programs. That is, under the primary effect test a direct aid program benefiting religious organizations but not limited to secular use has generally been held unconstitutional because the aid can be used for the organizations' religious activities and proselytizing. But if a program is limited to secular use, it has often still foundered on the entanglement test because the government's monitoring of the secular use restriction has intruded it too much into the affairs of the religious organizations. See *Lemon v. Kurtzman*, *supra*. The Court has for some time been sharply divided on the utility and applicability of the tripartite test and particularly of the entanglement prong. Nonetheless, the Court still uses the *Lemon* test, although it is no longer the exclusive test for establishment clause cases. Moreover, in *Agostini v. Felton*, 521 U.S. 203 (1997) the Court eliminated excessive entanglement as a separate element of the tripartite *Lemon* test and held it to be part of the inquiry into primary effect. As reformulated, the entanglement inquiry now asks whether government monitoring of a program would have the effect of inhibiting religion.

¹⁰ *Committee for Public Education v. Nyquist*, *supra*; *Lemon v. Kurtzman*, *supra*; *Bowen v. Kendrick*, *supra*.

¹¹ See, e.g., *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Lemon v. Kurtzman*, *supra*; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, *supra*; *Meek v.*
(continued...)

also made clear that "it is not enough to show that the recipient of a ... grant is affiliated with a religious institution or that it is 'religiously inspired.'"¹² Indeed, none of these factors, by itself, has been held sufficient to make an institution pervasively sectarian and therefore ineligible for direct aid.¹³ Such a finding has always rested on a combination of factors.

As a practical matter the Court has generally found religious elementary and secondary schools to be pervasively sectarian. In contrast, it has generally held religiously affiliated hospitals, social welfare agencies, and colleges not to be pervasively sectarian. But in its most recent decision involving public aid to religious social welfare agencies, the Court held open the possibility that some agencies might be pervasively sectarian.¹⁴

Thus, the secular use limitation on direct public aid under the establishment clause has two dimensions. The aid cannot be used for religious purposes, nor can it flow to institutions that are pervasively sectarian. As the Court summarized in *Hunt v. McNair*¹⁵:

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

I hope the foregoing is responsive to your request. If we may be of additional assistance, please call on us.

¹¹ (...continued)

Pittenger, 421 U.S. 349 (1975); *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976); and *Bowen v. Kendrick*, 487 U.S. 589 (1988).

¹² *Bowen v. Kendrick*, *supra*, at 621.

¹³ For helpful lower federal court discussions of the criteria bearing on whether an institution is pervasively sectarian or not, see *Minnesota Federation of Teachers v. Nelson*, 740 F.Supp. 694 (D. Minn. 1990) and *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999).

¹⁴ *Id*

¹⁵ 413 U.S. 734, 743 (1973).